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In The
Supreme Court of The United States

BENJAMIN H. MANN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI
with Appendix

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QUESTIONS PRESENTED

The U.S. Court of Appeals for the Sixth Circuit has affirmed the convictions and sentence of Benjamin H. Mann on a theory not presented in the indictment nor to the jury, despite the fact that the only statements identified in the indictment as false were admittedly literally true and the unpaid balance on the loan in question was not attributable to any criminal conduct by Mr. Mann. This holding raises four questions which warrant review by this Court:

1. Whether the convictions for bank fraud may be sustained on a theory neither alleged in the indictment nor presented to the jury?

2. Whether the convictions for bank fraud which are based solely on alleged false statements may be sustained where the alleged false statements are admittedly literally true?

3. Whether the convictions may be sustained where the district court refused to instruct the jury on the theory of the offense alleged in the indictment?

4. Whether the sentence in a bank fraud case may be enhanced pursuant to U.S.S.G. §2F1.1 where the unpaid balance on the loan is not attributable to any criminal conduct alleged in the indictment?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Benjamin H. Mann prays that a writ of certiorari issue to review a judgment of the U.S. Court of Appeals for the Sixth Circuit, affirming his convictions and sentence. Review is appropriate pursuant to Rule 10 of the Rules of this Court because the decision of the court of appeals conflicts with decisions of several other courts of appeals with regard to the application of the bank fraud statute, 18 U.S.C. § 1344, and Sentencing Guidelines U.S.S.G. § 2F1.1. In addition, the court of appeals violated principles of appellate review set forth by this Court by affirming the convictions on a ground not alleged in the indictment nor presented to the jury, all in violation of due process and inconsistent with relevant decisions of this Court. See Rule 10(a), (c).

OPINIONS BELOW

The decision of the district court denying Mr. Mann's motion for judgment of acquittal and new trial is not reported. (App. at E1, F1). The decision of the district court in regard to sentencing is not reported. (App. at C1). The judgment of conviction is set forth in the appendix at D1. The decision of the court of appeals is not reported. (App. at A1). The court of appeals order denying rehearing is not reported. (App. at B1).

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on October 20, 2000. Petitioner's petition for rehearing and rehearing *en banc* pursuant to Federal Rules of Appellate Procedure 35 and 40 was denied on December 12, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

18 U.S.C. §1344 is set forth at Appendix, G1.

U.S.S.G. §2F1.1 is set forth at Appendix, H1.

STATEMENT OF THE CASE

On August 26, 1997, defendant Benjamin H. Mann was indicted on four counts of bank fraud pursuant to 18 U.S.C. § 1344. The indictment alleged that Mr. Mann operated an equipment leasing company, Bison Leasing Company, Inc., which, in July, 1991 obtained loans of $1.75 million from Society National Bank (hereinafter "the bank"). The indictment did not allege any fraud in the loan application. Rather, the gist of the indictment was that after the loans had been obtained, Mr. Mann "would submit monthly Borrower's Certificates which falsely overstated the amount of gross remaining cash flow" on the leases owned by Bison. Each count of the indictment was premised on the alleged falsity of a particular Borrower's Certificate.

Trial commenced on March 23, 1998. Several witnesses, including government witnesses and bank employees, testified that the Borrower's Certificates referenced in the indictment were literally accurate according to the terms of the Credit Agreement drafted by the bank. One witness, Marvin Kodish, who was not employed by the bank at the time of the loan, testified that, although the Borrower's Certificates were literally correct, it was his "opinion" that the bank wanted different information on the Borrower's Certificate than Mr. Mann reported.

Mr. Mann requested that the jury be instructed on the theory set forth in the indictment, *i.e.*, that Mr. Mann could

only be found guilty if the jury found that the Borrower's Certificates, ***the only misrepresentations identified in the indictment***, were false, and, conversely, that if the jury found the Borrower's Certificates to be literally true, Mr. Mann could not be found guilty. The district court denied the instruction.

On March 30, 1998, the jury returned a verdict of guilty on each count. On April 6, 1998, Mr. Mann filed a motion for judgment of acquittal or for a new trial, which the district court denied on June 2, 1998.

The prosecution sought to enhance Mr. Mann's sentence from level 8 to level 18 on the ground that the unpaid balance of the loans constituted "loss" under the Sentencing Guidelines. The prosecutor submitted no evidence that the unpaid balance on the loans was due to the offenses alleged in the indictment. Mr. Mann submitted documentation and an affidavit of an accountant which established that, even if the Borrower's Certificates had been completed according to the "opinion" of one bank witness, the bank would have suffered a loss any way due to the financial failure of Mr. Mann's business.

The district court enhanced Mr. Mann's sentence by ten levels (from level 8, 0 to 6 months, to level 18, 27 to 33 months) based on the unpaid balance due on the loan. On September 29, 1998, a judgment was entered sentencing Mr. Mann to a term of 33 months, a term of supervised release of five years, and restitution.

Mr. Mann appealed to the U.S. Court of Appeals for the Sixth Circuit which affirmed his convictions and sentence. The court found that, despite evidence that the alleged false statements were literally true, the bank fraud convictions could be affirmed "predicated on the parties' private

meaning," even though no such private meaning was alleged in the indictment nor presented to the jury. (App. at A8). The court of appeals ignored the fact that the district court enhanced the sentence based on the unpaid balance due on the loan despite the fact that such balance was not attributable to the alleged criminal conduct. Mr. Mann's request for rehearing and rehearing en banc was denied.

REASONS FOR GRANTING THE PETITION

I. Review Is Warranted Granted Because the Court of Appeals Affirmed the Convictions on Grounds Not Alleged in the Indictment Nor Presented to the Jury, *i.e.*, that the Borrower's Certificates, Although Literally True, Violated An Unalleged "Private Meaning" Known Only to the Bank.

Each count of the indictment alleged a singular and separate false statement. For example, Count 4 alleged that

> the defendant BENJAMIN H. MANN, executed a Borrower's Certificate pertaining to the status of gross remaining cash flow of Bison for the month ending February 28, 1993, and submitted such Borrower's Certificate to Society National Bank knowing that said Borrower's Certificate falsely stated that the gross remaining cash flow was in the amount of $1,681,356.00, whereas, in truth and in fact as he then and there well knew, the gross remaining cash flow was substantially less than that amount; all in violation of Title 18, United States Code, Section 1344.

The district court did not instruct the jury on the theory espoused for the first time in the court of appeals, *i.e.*, that Mr. Mann could be convicted, even if the Borrower's

Certificates were literally true, based on an unexpressed unalleged private opinion held by a bank employee which rendered the Borrower's Certificates theoretically false.

The court of appeals affirmed the convictions on a ground neither alleged in the indictment nor presented to the jury. The court of appeals held that the convictions could be "predicated on the parties' private meaning," even though this meaning was not alleged in the indictment nor presented to the jury. (App. at A8).

This Court has held that"[w]e cannot affirm a criminal conviction on the basis of a theory not presented to the jury." Chiarella v. United States, 445 U.S. 222, 236 (1980). See McCormick v. United States, 500 U.S. 257, 269 (1991) (conviction reversed where "the Court of Appeals affirmed the conviction on legal and factual grounds that were never submitted to the jury."); Dowling v. United States, 473 U.S. 207 (1985) (validity of convictions would only be assessed under allegations made in indictment); Eaton v. City of Tulsa, 415 U.S. 697, 699 (1974) ("The Court of Criminal Appeals thus denied petitioner constitutional due process in sustaining the trial court by treating the conviction as a conviction upon a charge not made."); Garner v. State of Louisiana, 368 U.S. 157, 164 (1961) ("we cannot be concerned with whether the evidence proves the commission of some other crime, for it is as much a denial of due process to send an accused to prison following conviction for a charge that was never made as it is to convict him upon a charge for which there is no evidence to support that conviction."); Cole v. Arkansas, 333 U.S. 196, 201-202 (1948) ("It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. . . . To conform to due process of law,

petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined by the trial court."); De Jonge v. State of Oregon, 299 U.S. 353, 362 (1937) ("Conviction upon a charge not made would be sheer denial of due process."). See also United States v. Ross, 131 F.3d 970, 980 (11th Cir. 1997), cert. denied, 525 U.S. 913 (1998) ("This Court cannot affirm a criminal conviction based on a theory not contained in the indictment or not presented to the jury."); United States v. Haga, 821 F.2d 1036, 1046 (5th Cir. 1987) ("appellant was convicted of an offense for which he was not indicted and which was not asserted during his trial."); United States v. Danielson, 321 F.2d 441, 444 n. 8 (9th Cir. 1963) (A defendant cannot "be charged with one crime and convicted of another merely because the latter is developable out of the proof which fails to show the crime charged.").

In Dunn v. United States, 442 U.S. 100 (1979), the defendant was indicted for perjury based on inconsistency between his grand jury testimony and a ***September 30 interview***. The court of appeals upheld his conviction based on the inconsistency between his grand jury testimony and his testimony at an ***October 21 hearing***. This Court reversed the conviction. "To uphold a conviction on a charge which was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process. Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused." Id. at 106. The Court held that:

> There is, to be sure, no glaring distinction between the Government's theory at trial and the Tenth Circuit's analysis on appeal. The jury might well have reached the same verdict had the prosecution built its case on petitioner's October 21 testimony adopting his September 30 statement rather than on the September statement itself. ***But the offense was not so defined, and appellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial***.

Id. at 106-107 (emphasis added).

The sole allegation in the indictment in this case was bank fraud through the making of a false Borrower's Certificate. The case was presented to the jury based on that indictment and, when the evidence demonstrated that the Borrower's Certificates were literally true, the district court refused Mr. Mann's request for an instruction that the prosecution was limited to the offense charged in the indictment, *i.e.*, fraud through the submission of false Borrower's Certificates. Again, despite the fact that the Borrower's Certificates were literally true, the court of appeals affirmed the convictions on the ground that Mr. Mann had acted contrary to an "private meaning" never alleged in the indictment nor explained to the jury through the jury instructions as a basis for conviction.

Under the principles set forth in the relevant decisions of this Court, Mr. Mann's convictions cannot be affirmed based on a theory not alleged in the indictment nor set forth before the jury. Accordingly, pursuant to S.Ct.R. 10(c), this Court should grant the petition, issue the writ and vacate the convictions per curiam, or schedule this matter for plenary review.

II. Review Is Warranted Because the Decision Of The Court Of Appeals That Bank Fraud Convictions Can Be Sustained Where The Only False Statements Identified in the Indictment Are Literally True Conflicts With The Decisions Of Other Courts Of Appeals.

This case arose from a dispute between Mr. Mann and the bank regarding how discounted loans, *i.e.*, loans sold to other institutions, should have been reported on the Borrower's Certificates. The Credit Agreement provided that if Bison owned the assets which were the subject of the leases, the income from the leases should be reported on the Borrower's Certificates.

It was undisputed that the Certificates submitted by Mr. Mann literally complied with the Credit Agreement drafted by the bank. Three accountants and two employees of the bank testified that the Certificates were literally true. Marvin Kodish, the bank employee relied upon by the prosecutor, admitted that the Borrower's Certificates were literally true. Although not employed by the bank at the time of the loan, Kodish testified that, according to the Credit Agreement drafted by the bank, "the ***literal*** definition there [of recourse lease portfolio] is any lease whatsoever where the company kept the underlying object on its book as an asset." Kodish admitted that "whether or not they [Bison and Mr. Mann] sold off the payment stream, discounted or whatever, where it [the Credit Agreement] calls for all leases where they still own the asset, it [the Credit Agreement] calls ***literally*** for all the leases where they still own the asset." (Emphasis added). ***No one testified that the Borrower's Certificates were false.***

The only other evidence was Kodish's testimony that if a lease was discounted to another lender then it was his "***opinion*** of what the bank wanted" that the lease should not be reported on the Borrower's Certificate. (Emphasis added). Kodish was 1) not involved in the negotiation of the loan, 2) not involved in drafting the loan documentation, and 3) not even employed by the bank when the loan was made. Kodish did not testify that he ever advised Mr. Mann of his "opinion." Apparently, Kodish's speculation or opinion is the "private meaning" referred to by the court of appeals as the ground for affirming the convictions despite Kodish's admission that the Borrower's Certificates were literally true.

The sole basis for the fraud alleged in each count of the indictment was a single allegedly false Borrower's Certificate. The district court found that there was no basis for the alleged fraud other than the four allegedly false Borrower's Certificates. Therefore, the prosecutor was required to prove the allegations of the indictment, *i.e.*, that the Borrower's Certificates were false.[1]

The decisions of other courts of appeals conflict with the decision in this case and hold that a conviction based on an indictment alleging a false statement cannot be sustained where the statement is literally true. The conflict between the decisions of these courts and the decision in this case renders this case appropriate for review pursuant to S.Ct.R. 10(a).

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[1] "[T]he Court notes that this is not a case involving a fraudulent loan application. The Defendant was not charged with fraudulently procuring the loan. Rather, the fraud occurred afterwards, through the misrepresentation on the Borrower's Certificates of the gross remaining cash flow." (App. at C9-C10).

In United States v. Staniforth, 971 F.2d 1355, 1361 (7th Cir. 1992), abrogated on other gr'ds, 519 U.S. 482 (1997), the ***Seventh Circuit*** reversed the conviction of a defendant who was convicted of making a false statement by signing a note which stated that "[t]he Bank has or will acquire a security interest in . . . Stock." The government argued that this was the equivalent of a "'representation that the stock was a valuable asset which the bank could count on as security for the loan'" and "'was grossly inaccurate, as the defendant well knew.'" Id. The Seventh Circuit reversed, finding that the granting of a security interest in stock was not a representation regarding the stock's value.

> [T]here is no evidence that the parties attached a private meaning to the word "stock" - meant by it unencumbered stock or stock in which the borrower had a substantial equity interest. The statement was literally true and there is no evidence that the literal meaning is different from the parties' meaning.

Id. at 1362.

Likewise, in this case, as all witnesses agreed, the literal terms of the Credit Agreement required that Mr. Mann report the leases in the manner in which he did, including information regarding the lease payments remaining on each lease. Accordingly, the leases (on which the rental payments were due to other parties) are analogous to the stock in Staniforth which was encumbered by an obligation to another lender.

Similarly, in United States v. Blocker, 104 F.3d 720 (5th Cir. 1997), the ***Fifth Circuit*** reversed a conviction for bank fraud where the defendant had represented that a mortgage was current, a representation which was literally true. The government contended that this representation

was inaccurate because the mortgage was brought current only through additional borrowings. The court of appeals held that "[a]lthough it is true that Belwood had to borrow the money to make the mortgage payments, we are not prepared to hold that having to borrow the money renders the representation that the mortgage was current false." Id. at 734.

Likewise, in this case, Mr. Mann followed the literal terms of the Credit Agreement drafted by the bank and reported the leases on the Borrower's Certificates, including the rental payments due. That Bison had effectively borrowed on those leases by selling the payment stream did not mean that the payment stream did not exist. Similarly, the fact that the mortgage was current in Blocker did not mean that Blocker had any equity in the mortgaged property.

The court of appeals' opinion contradicts the Sixth Circuit's own decision in United States v. Gatewood, 173 F.3d. 983 (6th Cir. 1999), in which a defendant was convicted for submitting an alleged false certificate in connection with payments to subcontractors on a government contract. The court reversed the conviction on the ground that the certificate was literally true and could only be deemed false if one accepted the Navy's expectation or "view" that the certification meant something other than what it actually said.

> Here, the root of the problem lies in the certification itself, which could have been more artfully drafted. If the Navy had wanted to be sure that all payments then due the subcontractors had been made, it should have drafted the certification to reflect that desire.

Id. at 988. The Court found Gatewood not guilty ***as a matter of law.*** See also United States v. Watts, 72 F.Supp.2d 106 (E.D.N.Y. 1999) (a literally true statement is a defense in a prosecution for making a false statement to a bank pursuant to 18 U.S.C. 1014).

No more is alleged in this case. The district court confirmed that this case was based solely on the alleged false Borrower's Certificates and that there was not even an allegation of fraud in procurement of the loan. See note 1, supra. The only basis for the bank fraud charge was that the Borrower's Certificates were false, when in fact, they were literally true.

If the bank wanted Mr. Mann to report something other than that specified in the Credit Agreement, it should have drafted the Credit Agreement "to reflect that desire." ***The only evidence was that the Borrower's Certificates were literally correct.***

Mr. Mann was not convicted for making a false statement, but for failing to meet the after-the-fact unexpressed, unwritten expectations or "opinion" of Marvin Kodish regarding what should have been contained on the Borrower's Certificate. No court found that this meaning was ever conveyed to Mr. Mann. All Mr. Mann received was the Credit Agreement pursuant to which he submitted Borrower's Certificates which everyone agreed were literally true. Mr. Mann was convicted based on an "opinion" regarding what an ideal credit agreement should require and not the literal terms of the Credit Agreement in this case.

The Borrower's Certificates were literally true. No so-called "private meaning" was alleged. Other courts of appeals have refused to permit a conviction to stand where

the indictment alleges a false statement which is literally true. Accordingly, this Court should review this case, pursuant to S.Ct.R. 10(a), to resolve the conflict among the courts of appeals regarding the circumstances under which an accused charged with fraud through the making of a false statement may be convicted when the statement is literally true.

III. Review is Warranted Because the District Court Refused to Instruct the Jury On the Theory of the Offense Alleged in the Indictment.

Defense counsel requested that, since the indictment alleged that the Borrower's Certificates were false, that the jury be instructed that they must find the Borrower's Certificates to be false in order to convict Mr. Mann, and could not convict him if the Borrower's Certificates were literally true. The district court refused to give the requested instruction.

The instruction requested by Mr. Mann was:

> Following the literal terms under a reasonable meaning of a term or terms is a complete defense to the charges in the indictment since such conduct on the part of a defendant is inconsistent with intent to defraud or willfulness, which is an essential element of the charges. Charges in an indictment premised on statements, which on their face are not false, cannot survive.
>
> One who expresses an opinion by way of their compliance with what they believe the literal meaning of something is, which belief is honestly held by him, or a belief honestly entertained by him, is not chargeable with fraudulent intent.

> The burden of proof is not upon the defendant to prove his failure to follow the literal meaning of terms, of course, since he has no burden to prove anything. The United States must negate with proof beyond a reasonable doubt that the defendant did not follow the literal meaning of the terms in the loan agreement between the parties.

Pursuant to the relevant decisions of this Court cited and discussed in Part I, supra, a defendant is entitled to be tried on the charges set forth in the indictment and by a jury instructed on those charges. The district court refused to instruct on the theory alleged in the indictment, an error compounded by the court of appeals which affirmed the conviction on a ground not alleged in the indictment nor presented to the jury. The instruction requested comported with the plain language of the indictment and case law which precludes conviction on an indictment alleging false statements where the alleged statements are literally true.

Accordingly, pursuant to S.Ct.R. 10(a), (c), this Court should review this case because the district court refused to instruct the jury on the charge alleged in the indictment and because such failure conflicts with the decisions of other courts of appeals regarding indictments alleging fraud charges premised on alleged false statements.

IV. Review Is Warranted Because The Court Of Appeals' Decision Which Permits Sentence Enhancement Based on An Unpaid Loan Balance Unrelated to the Offense Conflicts With the Decisions Of Other Courts Of Appeals.

The court of appeals affirmed the district court's enhancement of Mr. Mann's sentence based on financial loss unrelated to the alleged offense, a decision which is contrary to precedent in every other circuit to have considered the issue. The court accepted the unpaid balance due on the loan as the "loss," despite the fact that such an unpaid balance on the loan would have existed ***even in the absence of the alleged fraud by Mr. Mann***. Entities with access to more credit and cash such as GE Capital and Citicorp overwhelmed the leasing market and small companies like Mr. Mann's could not compete financially and failed.

The court of appeals' approach permits district courts to enhance sentences without any controlling standard and ignores the standard applied by all other courts of appeals. The court of appeals' rejection of the decisions of other courts of appeals resulted in a ten-level enhancement of Mr. Mann's sentence from a level eight at 0 to 6 months to the 33-month sentence imposed. Accordingly, the conflict between the decision of the Sixth Circuit and those of other courts of appeals justifies review of this case pursuant to S.Ct.R. 10(a).

The court of appeals held that, no matter how erroneous, it must accept any calculation which is not "outside the universe of acceptable computations," despite the fact that the "'meaning of 'loss' . . . is a question of law that is subject to de novo review.'" United States v. Lucas,

99 F.3d 1290, 1293 (6th Cir. 1996). A "challenge to the method of calculation used by the district court implicates an application of the Guidelines and therefore is reviewed *de novo*." United States v. Randall, 157 F.3d 328, 330 (5th Cir. 1998).

Courts have been careful to limit loss for sentencing purposes to the financial injury attributable to the defendant's fraud, *i.e.*, "the value of the money, property, or services ***unlawfully taken*** . . . ." U.S.S.G. § 2F1.1(b), Application Note 7 (emphasis added). Losses caused by factors such as economic conditions or the otherwise poor financial condition of the borrower, rather than the offense, are not losses attributable to the defendant for sentencing purposes.

Courts have required the prosecutor to prove causation between the defendant's alleged offense and the unpaid balance of the loan and to quantify the amount of the loss. "The government can obtain the basic sentence in any event, Guidelines § 2F1.1(a), and if it seeks to enhance the sentence because of the size of the victim's loss, it is not asking too much for the government to be prepared to prove the actual amount of such loss." United States v. Smith, 951 F.2d 1164, 1167 n. 5 (10th Cir. 1991). See United States v. Evans, 155 F.3d 245, 253 (3d Cir. 1998) ("the defendant does not have to "prove the negative" to avoid the enhanced sentence. . . .").

While the amount of the loan might be an appropriate measure in cases where the fraud is in the procurement of the loan, the district court found that there was no procurement fraud in this case. See footnote 1, supra. In cases such as this one, where the alleged fraud is a misrepresentation regarding collateral during the loan's history, sentencing loss is calculated by deducting from the

amount due on the loan the business loss, *i.e.*, ***the amount that the bank would have lost due to business failure even if the false statement had not been made***. See United States v. Copus, 110 F.3d 1529 (10th Cir. 1997); United States v. Wilson, 980 F.2d 259 (4th Cir. 1992). The effect of setting loss at the amount of the unpaid loan balance in any case in which a loan is involved effectively places the burden on the defendant to disprove that the unpaid loan balance was attributable to the offense. See also United States v. Wilson, 993 F.2d 214, 218 (11th Cir. 1993) ("the face amounts [of the loans] did not provide 'a reasonable estimate of the loss,' and reliance on those figures was clearly erroneous.").

The courts of appeals have vacated sentences enhanced by district courts based on losses caused by economic factors unrelated to the offense.

Fourth Circuit. In United States v. Wilson, 980 F.2d 259 (4th Cir. 1992), the Fourth Circuit vacated the sentence because the district court failed to subtract loss due to business failure from the sentencing loss. Defendant Wilson arranged for Vintage Woods to borrow money ($292,000), with its assets as security for the loan. The loan agreement required the filing of monthly financial statements. Wilson failed to file the monthly financial statements, and when he did file one seven months later, it was false. In calculating loss, the district court, like the district court in this case, simply subtracted the amount recovered from the collateral from the outstanding balance on the loan. Wilson objected "because some of the loss suffered was not related to his criminal conduct." Id. at 262. The court held that

> ***while business losses began to occur soon after the loans were made, these losses were not related, as far as the record before us reveals, to the criminal conduct***. Rather, a false statement was filed approximately seven months after the loans were made. ***The task of the district court is to determine the amount of loss that is attributable to Wilson's criminal conduct.***

Id. at 262 (emphasis added).

Fifth Circuit. In United States v. Randall, 157 F.3d 328 (5th Cir. 1998), the Fifth Circuit vacated a sentence where the district court failed to subtract business loss from the sentencing loss. Randall defaulted on loans on several properties and filed false bankruptcy petitions. The properties were sold at auction at a price less than the amount owing on the loans. The lower court sentenced Randall based on the shortfall between the auction price of the properties and the loans. Randall appealed on the ground that the same losses would have occurred even if Randall had never submitted false bankruptcy filings.

The court of appeals, Judge Garza writing, held that "[b]efore a court may attribute losses to a defendant's fraudulent conduct, 'there must be some factual basis for the conclusion that th[o]se losses were the result of fraud.'" Id. at 331. "In other words, section 2F1.1 is concerned solely with 'the amount of loss *caused by the fraud*.'" Id. (emphasis in original). The court of appeals reversed, finding that the losses were caused by Randall's default on the mortgages, not by her later false statements.

> [T]he evidence indicates that the government agencies would have incurred the foreclosure losses even if Randall had never filed a fraudulent bankruptcy petition. They still would have had to foreclose on the properties, compensate the mortgage companies, and incur the related fees and expenses. Consequently, it cannot fairly be said that the short sale losses and foreclosure expenses are attributable to Randall's fraudulent conduct.

Id. at 331. Therefore, "losses stemming solely from her default and the consequent foreclosure are not properly considered in sentencing." Id. at 332-333.

Seventh Circuit. In United States v. Marlatt, 24 F.3d 1005 (7th Cir. 1994), the Seventh Circuit vacated the sentence where the district court had included in loss the amount by which the value of real property had diminished due to the real estate market. The owner of a title company sold time-share condominiums and provided the buyers with title insurance indicating that the titles were clear, despite knowing that the titles were heavily encumbered. When the title insurance company learned of the fraud, it spent $476,000 to clear the titles. After the value of the condominiums had plummeted due to the economy, the title insurance company spent another $565,000 re-purchasing the condominiums after the purchasers threatened to sue. The district court concluded that the loss included both the $476,000 to clear the title and the $565,000 to re-purchase the properties. The Seventh Circuit, Judge Posner writing, reversed, finding that the $565,000 should not have been included in loss.

> The [$565,000] loss was not a consequence of the fraud . . . . [The title company] had made good the only loss caused in a legal sense by the defendant's fraudulent concealment of the defects in the titles it had insured. We do not know the cause of the loss of which the purchasers complained. It may have been a collapse of the local recreational real estate market, business mistakes by the defendant, some unrelated fraud by the defendant, or a completely extraneous event. ***All we know for sure is that the loss in value was not caused by the defective titles. For after the defects were removed, the loss remained***. The fact that the purchasers would not have purchased the time shares had it not been for the title insurance policies issued by [the title company] would not make [the title company] an insurer against a drop in the real estate market.

Id. at 1007 (emphasis added).

Judge Posner noted that "Application Note 7(b) distinguishes between loss on the one hand and consequential and incidental damages on the other and makes clear that with irrelevant exceptions the latter two items are not to be counted in computing loss for purposes of sentencing under this guideline. The reason for the distinction is no doubt to prevent the sentencing hearing from turning into a tort or contract suit." Id. "What the judge is not permitted to do is to add consequential or incidental damages to the loss in determining which guidelines range is applicable." Id. at 1008.

Tenth Circuit. In United States v. Copus, 110 F.3d 1529, 1535 (10th Cir. 1997), the Tenth Circuit, following the Fourth Circuit's decision in Wilson, vacated the sentence in a case where the defendant executed notes

which were secured by cattle. The defendant was charged with falsely representing the collateral, *i.e.*, the number of cattle he owned at an inspection during the loan.

> "[W]e hold that in the event a bank loan legitimately is obtained by one who subsequently submits a statement that is required in connection with the loan and that statement is false (e.g., defendant falsifies a required periodic report of his current assets), the loss under U.S.S.G. § 2F1.1 is the loss that can be attributed to the false statement. Generally, the loss attributable to the false statement is the amount of the outstanding loan less any amount recouped by the bank from assets pledged against the loan, ***less the estimated amount the bank would have lost had the statement not been false***."

Id. at 1535 (emphasis added). The court held that the loss could be calculated by determining what the bank would have recovered had it foreclosed following the inspection at which the defendant had misrepresented the number of cattle securing the loan. Id. The court of appeals remanded for re-sentencing.

The Tenth Circuit applied the same principle in United States v. Abud-Sanchez, 973 F.2d 835 (10th Cir. 1992), vacating the sentence of a physician convicted of making false statements in connection with Medicare and Medicaid on the ground that it could not be determined which overcharges were criminal and which were civil. "A loss that supports enhancement of a criminal sentence under the Guidelines cannot be the result of civil fraud for which a person cannot be imprisoned." Id. at 835.

Eleventh Circuit. In United States v. Eidson, 108 F.3d 1336 (11th Cir.), cert. denied, 522 U.S. 899 (1997), the Eleventh Circuit vacated the sentence of a defendant convicted of mail fraud for billing customers for wastewater which was not disposed of as promised. The court of appeals found that the district court erred in including all of the defendant company's revenues in loss, holding that "there must be some factual basis for the conclusion that these losses were the result of fraud." Id. at 1346-1347.

Second Circuit. In United States v. Stanley, 54 F.3d 103, 105 (2d Cir.), cert. denied, 516 U.S. 891 (1995), a case which involved multiple sentencings, the defendant had purchased bonds at $100 per share and then, when they started failing, misrepresented their value to the investors. The court of appeals noted that the district "court conceded that the initial $28 per bond loss which occurred before the fraud began ($100 - $72) was attributable to a poor investment decision and therefore not fairly included in the loss calculation." Accordingly, the loss attributable to a non-fraudulent poor investment or a downturn in the value of the investment was not included in loss for sentencing purposes.

Third Circuit. In United States v. Daddona, 34 F.3d 163 (3d Cir. 1994), cert. denied, 513 U.S. 1002 (1994), the Third Circuit vacated the sentences of defendants convicted of fraud in connection with fraudulent performance bonds. The contractor had defaulted and it had cost the investor in the project more than $1.5 million to complete it. The court found that Summit, the investor was not named as an obligee on the bonds and that there was no evidence that Summit was harmed by the fraudulent issuance of the bonds. "What the record does not contain is any indication that this loss was due to the fraud of the appellant rather

than the obvious failure of two general contractors . . . ." Id. at 170. The court concluded that the cost to complete the project was not the loss caused by the fraud and that such loss should be calculated by determining what claims went unsatisfied due to the defects in the bonds. "[T]his loss [cost of completion] is 'not the thing actually taken' from Summit as a result of their fraudulent activities.'" Id. at 172. The court followed the Seventh Circuit's decision in Marlatt, supra.

Other circuits have alluded to or approved the rule excluding business loss for sentencing purposes. In United States v. Gottfried, 58 F.3d 648, 652 (D.C. Cir. 1995), the D.C. Circuit found that the cases cited above "stand for the general proposition that only 'direct' losses count."

In this case, the bank's losses were caused by Bison's default on the loan and not by the alleged false statements. The existence of an unpaid loan balance due to default is reasonable, given the bank's admission that the Bison loan was a "tight loan to fund from the very beginning" and that there were late payments or payment defaults "quite early in this relationship." By July, 1992, ***about a year before the bank called the loan***, the bank "knew that the company was experiencing cash flow difficulties in the administration and payment of this loan." Accordingly, the existence of a substantial business loss is reasonable and non-speculative.

The prosecutor introduced no evidence that the balance due on the loan was caused by the alleged offenses. Mr. Mann's sentence should not be enhanced for an unpaid loan balance and default incurred because of business conditions or the bank's decision to make a bad loan, particularly in a case where there was no dispute that there was no fraud in the procurement of the loan. Mr. Mann provided

documents and a sworn statement from an expert accountant who calculated that, even in the absence of the alleged offenses, there still would have been a balance due on the loan.

Calculation of loss was the most critical part of sentencing in this case as the district court recognized in stating that "the offense level in this case is highly dependent upon the loss to the bank." (App. at C4). However, the district court refused to reduce the unpaid loan balance by losses which the bank would have suffered even in the absence of the alleged offenses.

The panel opinion ignored this defect and effectively amended the Guidelines to inflate sentences based on civil liabilities not caused by the alleged criminal conduct. If a defendant experiences financial difficulties which result in the bank taking a loss on the loan, the Guidelines do not authorize imprisoning the defendant for loss the bank suffers which cannot be traced to the criminal conduct. To do so would be to create a modern debtor's prison for every small business owner who commits the newly criminalized offense of business failure.

Accordingly, pursuant to S.Ct.R. 10(a), this case should be reviewed by this Court to resolve the conflict between this case and the decisions of the several courts of appeals regarding the calculation of loss, a conflict which threatens to inflate sentences where the loss is due to business failures or economic conditions and not an offense proscribed by Congress.

CONCLUSION

For the reasons set forth more fully hereinabove, the petition should be granted and the writ issued to review:

1) The court of appeals' decision affirming the convictions on a ground not alleged in the indictment nor presented to the jury, in conflict with the relevant decisions of this Court;

2) The significant conflicting decisions among the courts of appeals which, contrary to the pending case, vacate convictions on an indictment alleging a false statement where the statement is literally true;

3) The conflict between the district court's refusal to instruct the jury on the charge set forth in the indictment and this Court's decisions limiting convictions to such charges; and

4) The significant conflict between the courts of appeals with regard to whether an unpaid bank loan arising from business failure and not criminal conduct may be used to enhance a sentence.

In light of the clear error by the court of appeals in affirming a conviction on a ground not alleged in the indictment nor presented to the jury and the clear authority from other courts of appeals on the calculation of loss, this Court may, without further proceedings, vacate the convictions on the first or third grounds or remand the case to the court of appeals for reconsideration in light of the decisions of the other courts of appeals on the sentencing issue rather than hear such issues on plenary review.

Respectfully submitted,

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NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Case No. 98-4219

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

6th Circuit
Court of Appeals
Filed 10/29/00
Leonard Green,
Clerk

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
	)
v.	) **On Appeal from**
	) **the United States**
BENJAMIN H. MANN,	) **District Court**
	) **for the Northern**
Defendant-Appellant.	) **District of Ohio**

Oct. 20, 2000.

Before BATCHELDER and DAUGHTREY, Circuit Judges, and STEEH, District Judge.*

PER CURIAM: Benjamin H. Mann appeals his convictions and sentence for bank fraud under 18 U.S.C. § 1344. For the reasons set forth below, we affirm the judgment of the district court.

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* The Hon. George Caram Steeh, United States District Judge for the Eastern District of Michigan, sitting by designation.

I

Mann served as president of the equipment leasing companies Bison Leasing Company, Inc. and Bison Equipment Leasing, Inc. (jointly referred to as "Bison"). In 1991, Mann sought refinancing of Bison's $2 million dollar loan with Ameritrust Bank, which was calling the loan at that time. Toward that end, Mann retained the accounting firm of Price-Waterhouse in Cleveland, Ohio, to produce a prospectus for refinancing the Ameritrust loan.

Price-Waterhouse accountant Albert Melchiorre did most of the work on the prospectus. Melchiorre learned that the primary collateral being offered by Bison to prospective lenders was reflected in Bison's "Recourse Lease Portfolio," The Recourse Lease Portfolio identified the various leases by lease number, customer name, monthly payment amount, date of last payment received, the remaining cash flow expected to be received, and other information regarding each lease. "Remaining cash flow" meant the number of payments remaining on the lease times the monthly payment. Based on the lease portfolio, there appeared to be approximately $2.3 million total lease payments that Bison expected to receive. According to Melchiorre, leases that were discounted would not be reflected in the Recourse Lease Portfolio. When a lease is discounted, the rights to the lease's payments are sold for a lump sum less than the value of the total payments. After discounting, rental payments were made to the entity that purchased the rights to the lease, but Bison retained ownership of the underlying asset.

Price-Waterhouse's work culminated in the production of a "Refinance of Lease Portfolio ("P-W Prospectus"), to which a copy of the Recourse Lease Portfolio was attached. The P-W Prospectus provided an explanation of Bison's

lease process, including the closing of lease transactions:

> Close-Bison will process the finalized transaction in one of three manners:
>
> 1. Record the item on its books on a recourse basis;
> 2. Sell the transaction in its entirety on a broker basis for a fee;
> 3. Discount the outstanding rental stream on non/recourse basis.
>
> The items capitalized are accounted for on Bison's books, which represent Bison's lease portfolio. Bison generally prefers to discount the rental streams or to own the property for its own account due to the benefits of ownership for both tax purposes and the realization of the residual values.

According to Melchiorre, the Recourse Lease Portfolio included those leases which fell within the type of transaction described under paragraph number 1, above.

Armed with the P-W Prospectus, Bison approached loan officer Keith Grinberg at Society National Bank ("SNB"), a federally insured bank. After negotiations with Mann. SNB agreed in 1991 to loan Bison $1.75 million. The loan was divided into two parts: the "Facîlity I" loan for $1.5 million, and "Facility II" loan for $250,000. Prior to the closing of the loan, SNB had obtained from Mann the Recourse Lease Portfolio. This June 1991 portfolio was examined by SNB's auditors, who were told by Mann that the gross remaining cash flows in the portfolio as of that date represented the remaining monthly payments to be received by the company. According to Grinberg. SNB considered the primary source of collateral to be the leases

and the gross remaining cash flow being generated from the leases.

The Credit Agreement made by the parties required Bison to maintain a specific ratio between the principal balance due on the loan and the "gross remaining Cash Flow on the Recourse Lease Portfolio." The Credit Agreement defined "Cash Flow" as "a Person's net income after provision for all taxes," and "Recourse Lease Portfolio" as "those lease obligations maintained on the books and records of the Companies as fixed assets." Bison was further required by the Agreement to provide Borrower's Certificates to SNB on a monthly basis. The Certificates required Bison to calculate its "Statement of Condition" using the "Total Amount of Gross Remaining Cash Flow on Recourse Lease Portfolio." According to Grinberg, the gross remaining cash flow was "the amount of money that was going to come into Bison Leasing for all the leases that were outstanding in what we call the recourse lease portfolio." The borrower's certificates generally had attached to them the computerized print-out of the recourse lease portfolio for the relevant time period summarizing all the remaining cash due from all the leases to Bison's customers.

In 1993, Mann asked that the loan be restructured. In a letter dated March 15, 1993, Mann proposed the details of the restructuring agreement and assured the bank that under the terms of the agreement, SNB would be "more than adequately protected through the term of the restructure" by the gross remaining cash flows held by Bison at that time. In May of that year, Bison finalized an amendment to the loan agreement. Throughout the life of the Bison loan, Grinberg was never told that the Recourse Lease Portfolio given to him by Mann contained leases that were discounted.

Bison went into default on the SNB loan shortly after the restructuring in May 1993. SNB took cognovit judgments against Bison in June and obtained the companies' lease portfolio for liquidation. An audit of the portfolio revealed that, although Bison's last statement of Gross Remaining Cash Flow was some $1.6 million, only leases with remaining payment streams of $346,000 were subject to SNB's security interest. On the Borrower's Certificates, Mann had included in the Statements of Condition leases that had been discounted to other lenders. In addition, Mann had reported Gross Remaining Cash Flow from the lease of a Ferrari, even though the Ferrari had itself been sold. After liquidation of the portfolio, Bison still owed SNB $1,002,072.83.

SNB referred the matter for prosecution for bank fraud under 18 U .S.C. § 1344, and a federal grand jury returned a four-count indictment on August 26, 1997. The indictment observed that, "As a part of its agreement to Society, the defendant caused Bison to agree to report to Society, on a monthly basis, the amount of cash flow being generated by the leases owned by Bison which the bank could consider as part of its collateral to the loan being given to Bison." Further describing the Borrower's Certificates, the indictment stated that "Society used the calculation to assure itself that it was protected by sufficient cash flow collateral to cover the balance of the primary loan in the event of default." Finally, the indictment charged that the Borrower's Certificates submitted by Mann "falsely stated" Bison's gross remaining cash flow.

A jury returned a verdict of guilty on all counts. Mann was sentenced to a term of imprisonment of thirty-three months followed by five years' supervised release, and ordered to pay restitution of $760,520.00. Mann timely

appeals.

II

On appeal, Mann's primary contention is that his statements on the Borrower's Certificates were literally true and hence that there was insufficient evidence to support his conviction for bank fraud. The bank fraud statute, 18 U.S.C. § 1344, provides:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice-
>
> > (1) to defraud a financial institution; or
> > (2) to obtain any of the monies, funds, credits, assets, securities, or other property owned by, or under the custody or control of a financial institution, by means of false or fraudulent pretenses, representations, or promises....
>
> shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Three elements are required for a conviction for bank fraud under § 1344(1):(1) that the defendant knowingly executed or attempted to execute a scheme to defraud a financial institution; (2) that the defendant did so with the intent to defraud; and (3) that the financial institution was insured by the FDIC. United States v. Hoglund, 178 F.3d 410, 412-13 (6th Cir.1999). We will reverse a § 1344(1) conviction for insufficiency of evidence only if, viewing the record as a whole, the judgment is not supported by substantial and competent evidence. See United States v. Blakeney, 942 F.2d 1001, 1010 (6th Cir.1991).

Mann argues that since the Recourse Lease Portfolio

was defined to include fixed assets, and since Bison retained ownership of assets whose leases had been discounted, he complied with the literal terms of the Borrower's Certificate when he listed cash flows from discounted leases. Mann goes on to contend that the evidence relied upon by the government to establish a different understanding of the agreement between Bison and SNB would be "laughed out of court under the parol evidence rule and other rules of contract construction in a civil case," and that it would be "lawless" to permit a criminal prosecution based on such evidence.

We first observe that proof of an affirmative misrepresentation is not required to sustain a conviction for bank fraud in this Circuit. This is made clear by the cases holding that check kiting schemes can amount to bank fraud. A bad check does not constitute a false statement because a check does not make any representation as to the state of an account holder's bank balance; rather, it is merely an order to the drawee bank to pay a sum certain to the holder. United States v. LeDonne, 21 F.3d1418, 1425 (7th Cir.1994). Nevertheless, the courts have held that check kiting can constitute a "scheme to defraud" within the meaning of § 1344(1) because that term

> was broadly conceived to include conduct designed to deceive in order to obtain something of value, which ... may or may not include conduct involving false statements or misrepresentations of fact.... [T]he focus of the offense of a scheme to defraud is on the intended end result, not on whether a false representation was necessary to effect the result. Thus it matters not whether the fraudulent scheme was accomplished by an affirmative misrepresentation nor whether the fraud succeeded and the victim deceived.

Id. at 1426 (citations and internal quotation marks omitted); accord United States v. Stone, 954 F.2d 1187, 1189-91 (6th Cir.1992). Fraud is measured in a particular case "by determining whether the scheme demonstrated a departure from fundamental honesty, moral uprightness, or fair play and candid dealings in the general life of the community." United States v. Goldblatt, 813 F.2d 619, 624 (3d Cir.1987). "The bank fraud statute condemns schemes designed to deceive in order to obtain something of value." Id.

Mann acknowledges that there is no "literally true" defense to § 1344(1) prosecutions, but nonetheless contends that the indictment in this case alleged a scheme based on false statements, and that the government was required to prove the allegations of the indictment and not some other offense not alleged therein. This is indisputably true. Mann's error lies in his failure to recognize that falsity can be predicated on the parties' private meaning, and that even the false statement cases that he cites to this court acknowledge that fact. See, e.g., United States v. Staniforth, 971 F.2d 1355, 1362 (7th Cir.1992). The indictment in this case made it apparent that the parties' interpretation of the Credit Agreement was at issue, stating twice that SNB used the information on the Borrower's Certificates to assure itself that it was protected by sufficient cash flow collateral to cover the balance of the loan in the event of default. The evidence presented in this case therefore did not amount to a variance from or a constructive amendment to the indictment, as Mann apparently means to suggest. See United States v. Barrow, 118 F.3d 482, 488-89 (6th Cir.1997) (discussing variance and constructive amendment).

Moreover, the literal meaning of the Borrower's Certificates is not so clear as Mann maintains. The

Certificates required Mann to disclose the gross remaining cash flow on the recourse lease portfolio. While the meaning of "recourse lease portfolio" may have been clear, having been defined in the Credit Agreement, the meaning of "gross remaining cash flow" was not. The Credit Agreement defined "cash flow" as "net income", but it is far from clear that "income" can be understood to include payments made to a third party rather than to the party reporting the income. Even under the parol evidence rule, which Mann invokes repeatedly, the parties would have been able to introduce extrinsic evidence to clarify the meaning of this ambiguous term. Cf. Armistead v. Vernitron Corp., 944 F.2d 1287, 1295 (6th Cir.1991).

The government introduced substantial, competent evidence to support its contention that "gross remaining cash flow" meant payment streams to be received by Bison that SNB could consider as collateral. Price-Waterhouse accountant Albert Melchiorre testified that lending institutions would regard the payments generated from portfolio leases as "a form of repayment for any financings that would occur." Accountant Paul Koomer testified that it was his understanding that gross remaining cash flow "represented the remaining monthly payments to be received by the company." And SNB officer Marvin Kodish testified that payment streams from discounted leases should not have appeared on the Certificates.

To be sure, Mann adduced expert testimony supporting his interpretation of the Credit Agreement. But it was certainly within the province of the jury to credit the government's witnesses over Mann's. See United States v. Elder, 90 F.3d 1110, 1122 (6th Cir.1996) ("Assessing the credibility of the witnesses is the province of the jury."). This is particularly true in light of the fact that discounted leases were added to Bison's portfolio at irregular times,

even though leases were usually added to the portfolios according to their start date. Furthermore, Mann's interpretation of the Credit Agreement runs counter to common sense; a creditor would presumably only be interested in receiving reports from its debtor of cash flows that would be subject to the creditor's security interest, not of cash flows that would go to some third party. For these reasons, sufficient evidence supports the jury's conclusion that Mann engaged in a scheme to defraud SNB.

III

At trial, Mann requested an instruction requiring a finding of not guilty if the jury found that his statements on the Borrower's Certificates were literally true. The district court refused, giving a detailed good faith instruction instead. On appeal, Mann argues that he was entitled to the requested instruction.

We review jury instructions as a whole to determine whether they fairly and adequately submitted the issues and applicable law to the jury. See United States v. Williams, 952 F.2d 1504, 1512 (6th Cir.1991). A party is not entitled to a new trial based upon alleged deficiencies in the jury instructions unless the instructions, taken as a whole, are misleading or provide an inadequate understanding of the law. See Bowman v. Koch Transfer Co., 862 F.2d 1257, 1263 (6th Cir.1988). Because the correctness of jury instructions is a question of law, we review de novo a district court's jury instructions. See United States v. 73.29 Pounds of Semi-Precious Stones, 7 F.3d 480, 486 (6th Cir.1993).

Here, the district court did not err in refusing Mann's proffered instruction on "literal truth." As discussed above, an affirmative misrepresentation is not an element of bank

fraud, and the good faith instruction that the court gave adequately informed the jury that Mann would lack the necessary scienter for the offense if he truly believed that the statements he made on the Borrower's Certificates were true. Cf. United States v. Sasser, 974 F.2d 1544, 1553-54 (10th Cir.1992) (no instruction required on the issue of whether the defendant's conduct comported with the literal language of a HUD application).

IV

At trial, the district court admitted a portion of a deposition from Mann's personal bankruptcy in which Mann indicated that he understood that non- recourse (e.g., discounted) leases were not to be reported on the Borrower's Certificates. The court excluded, however, subsequent testimony in which Mann attempted to explain why discounted leases were included in reports submitted to SNB. On appeal, Mann argues that under Fed.R.Evid. 106 he was entitled to have the finder of fact consider the excluded portions.

Fed.R.Evid. 106 provides:

> When a writing or recorded statement or a part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

We review a trial court's decision regarding the admissibility of testimony and other evidence for an abuse of discretion. United States v. Branham, 97 F.3d 835, 850 (6th Cir.1996).

In this case, the better practice would have been for the district court to admit the eight additional pages from Mann's deposition. Cf. Engebretsen v. Fairchild Aircraft Corp., 21 F.3d 721, 729 (6th Cir.1994) (holding that plaintiff's impeachment of defendant by use of report entitled defendant to introduce other statements in the report to rebut the charge of inconsistency and bias). Any error in this regard, however, was harmless. "This circuit has held that an error by a district court with respect to the admission of evidence is subject to harmless error analysis, and it is well settled that an error which is not of constitutional dimension is harmless unless it is more probable than not that the error materially affected the verdict." United States v. Daniel, 134 F.3d 1259, 1262 (6th Cir.), cert. denied, 525 U.S. 830 (1998) (internal quotation omitted). The strength of the evidence of guilt is an important factor in this calculus. See United States v. Nathan, 816 F.2d 230, 238 (6th Cir.1987). The evidence against Mann was substantial and refuted only by his improbable theory that the Borrower's Certificates required him to report cash flows that SNB could not reach as collateral. The jury deliberated only a few hours before returning a verdict of guilty. There is no likelihood that this verdict would have been different had Mann been allowed to present evidence that he had espoused the same theory of the defense in his personal bankruptcy proceeding.

V

The district court concluded that Mann had caused SNB some $760.520 in losses. To arrive at this figure, the court used the application note for fraudulent loan applications, U.S.S.G. § 2F1.1 (n.8(b)), and calculated SNB's loss according to the amount of the loan not repaid less the amount of collateral recovered. Pursuant to U.S.S.G. § 2F1.1, the court increased Mann's base offense

level by ten. On appeal, Mann charges that this enhancement was error.

This court reviews de novo the district court's calculation of loss under the sentencing guidelines. United States v. Lucas, 99 F.3d 1290, 1293 (6th Cir.1996); United States v. Wolfe, 71 F.3d 611, 616 (6th Cir.1995). The sentencing court's factual findings must be established by a preponderance of the evidence and are upheld unless they are clearly erroneous. United States v. Flowers, 55 F.3d 218, 220 (6th Cir.1995); United States v. Watkins, 994 F.2d 1192, 1195 (6th Cir.1993). A criminal defendant who appeals the district court's sentence enhancement based upon the amount of loss caused by fraud must show that the court's calculation of loss "was not only inaccurate, but was outside the universe of acceptable computations." United States v. Jackson, 25 F.3d 327, 330 (6th Cir.1994); see also United States v. Parrish, 84 F.3d 816, 819 (6th Cir.1996); United States v. Moored, 38 F.3d 1419, 1424 (6th Cir.1994).

Mann contends that enhancing his sentence for the entire loss suffered by SNB punishes him for business risk that SNB knowingly undertook. Thus, Mann argues that the district court should have followed the Fourth Circuit's rule in United States v. Wilson:

> we hold that in the event a bank loan legitimately is obtained by one who subsequently submits a statement that is required in connection with the loan and that statement is false (e.g., defendant falsifies a required periodic report of his current assets), the loss under U.S.S.G. § 2F1.1 is the loss that can be attributed to the false statement. Generally, the loss attributable to the false statement is the amount of the outstanding loan less any

> amount recouped by the bank from assets pledged against the loan, less the estimated amount the bank would have lost had the statement not been false.

Wilson, 980 F.2d 259, 262 (4th Cir.1992); see also United States v. Copus, 110 F.3d 1529, 1535 (11th Cir.1997) (following Wilson); United States v. Stanley, 54 F.3d 103, 105 (2d Cir.1995) (approving, in case where trust officer misstated valuation of bonds in periodic statements subtraction of loss that occurred before fraud began and that was attributable to a poor investment decision). The Fourth Circuit's methodology is a sensible one. See Frank O. Bowman, III, Coping with "Loss": A Re-examination of Sentencing Federal Economic Crimes Under the Guidelines, 51 Vand. L.Rev. 461, 527-36 (1998) (noting the importance of causation in determining loss). Nevertheless, we agree with the district court that this case is distinguishable; Wilson involved a single false statement rather than a course of fraudulent conduct through almost the entire life of the loan. Indeed, Mann was able to obtain restructuring of the Credit Agreement itself as a part of the scheme and artifice to defraud SNB. In such a case-where an ongoing scheme of fraud continues for a period exceeding a year-a calculation of loss according to the amount of the loan not repaid less the amount of collateral recovered is not "outside the universe of acceptable computations."

VI

The district court enhanced Mann's sentence pursuant to U.S.S.G. § 2F1.1(b)(2)(A), which provides for an increase of two levels to the base offense level if more than minimal planning was involved in the offense. Mann argues that he should not have received this enhancement because his acts amounted to no more than bank fraud in its

"simple form." See U.S.S.G. § 1B1.1 n.f. We review de novo the district court's legal conclusions regarding application of the sentencing guidelines, and we accept its factual findings unless they are clearly erroneous. United States v. Lewis, 156 F.3d 656, 658 (6th Cir.1998).

Mann's contention lacks merit. Mann submitted false Borrower's Certificates to SNB repeatedly, and "[m]ore than minimal planning" is deemed present in any case involving repeated acts over a period of time. See U.S.S.G. § 1B1.1 n.f. Moreover, the scheme of identifying discounted or expired leases, changing their start dates, including them in the portfolios, and keeping the fraud consistent over a period of months plainly involved considerable planning.

VII

The district court ordered Mann to pay restitution of $760,520.00. Mann argues that he should not be subject to a restitution order because he is unemployed, jailed, and has a net worth of approximately -$1,414,935.00.

The statute governing restitution, 18 U.S.C. § 3663(B)(i), provides:

> The court, in determining whether to order restitution ... and the amount of such restitution, shall consider: (I)the amount of the loss sustained by each victim as a result of the offense; and (II) the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

This court reviews the district court's order of restitution for

abuse of discretion, but reviews the district court's application of a statute de novo. United States v. Blanchard, 9 F.3d 22, 24 (6th Cir.1993).

We conclude that Mann's argument is foreclosed by United States v. Blanchard. In Blanchard, the defendant was a business executive whom the district court ordered to pay restitution of $118,000 despite having liabilities of more than $1,000,000. Id. at 23-24. The Court of Appeals affirmed, observing that Blanchard "has excellent earning ability, even if he is in a temporary financial bind." Id. at 25. The same may be said of Mann; he still has an earning capacity and, apparently, some source of funds. Taken together with the fact that there is no time limit on the payment of the restitution, these factors show that the district court did not abuse its discretion.[1]

VIII

For the foregoing reasons, the order of the district court is affirmed.

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[1] After taking this case to trial and protesting his innocence on appeal, Mann further argues that he is entitled to a two-level reduction in his offense level for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1(a) because, "[t]o the extent that his conduct was false or misleading, [he] regrets his conduct and accepts responsibility for it." We find that Mann has satisfied none of the criteria set forth at U.S.S.G. § 3E1.1 n. 1 and has not clearly demonstrated acceptance of responsibility.

98-4219

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, **Plaintiff-Appellee,**	)	
v.	)	**ORDER**
BENJAMIN H. MANN, **Defendant-Appellant.**	)	

6th Circuit
Court of Appeals
Filed 12/12/00
Leonard Green,
Clerk

BEFORE: BATCHELDER and DAUGHTREY, Circuit Judges; and STEEH,[1] District Judge

The court having received a petition for rehearing *en banc*, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition

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[1]Hon. George C. Steeh, United States District Judge for the Eastern District of Michigan, sitting by designation.

were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

CASE NO. I :97CR239
vs. **Judge John M. Manos**

BENJAMIN H. MANN,
Defendant.

Northern Dist.
of Ohio
Filed 10/5/98

MEMORANDUM OF OPINION

On March 30, 1998, Benjamin H. Mann, defendant, was convicted by a jury on four counts of bank fraud in violation of 18 U.S.C. § 1344. On September 23, 1998, after a hearing, the Court sentenced him to thirty three (33) months imprisonment, followed by five (5) years of supervised release, and a $200 special assessment pursuant to statute. Because this sentence involves complex issues, and in anticipation that either or both parties may appeal the sentence, the Court issues this Memorandum of Opinion in aid of any appeal to explain in detail the basis for the sentence.

I. FACTS[1]

A. Background

On August 26, 1997, the Defendant was indicted on four counts of executing a scheme and artifice to defraud a federally insured financial institution in violation of 18 U.S.C. §1344. The indictment alleged that the Defendant was the president and majority shareholder of Bison Leasing Company, Inc. and Bison Equipment Leasing Company, Inc (collectively "Bison"). Bison had received a loan from Society National Bank (now Keycorp) in the amount of $1,750,000. The Defendant allegedly overstated the value of assets of Bison upon which the bank could rely as collateral for the loan. In particular, each count charges him with providing Society a "Borrower's Certificate" falsely stating the amount of gross remaining cash flow due Bison on certain leases, while knowing the amount of gross remaining cash flow was substantially less.

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[1]Additional facts relating to this case are detailed in the Court's Memorandum of Opinion and Order dated June 2, 1998, denying the Defendant's motion for judgment of acquittal, or alternatively a new trial. In this opinion, the Court limits the factual recitation to what is pertinent to sentencing.

Bison was in the business of leasing various types of equipment, in which field the Defendant had substantial experience. He signed a credit agreement with Society governing the loan. Under the credit agreement. he was to report the "gross remaining Cash Flow on the Recourse Lease Portfolio" to Society. The amount was to be reported on a Borrower's Certificate. (Credit Agreement, ¶ 5.2, Government Trial Exs. 1-12.) He also submitted computer printouts (the "lease reports") containing information as to the various leases. (See Government Trial Exs. 1A-12A.)

The evidence revealed that the Defendant entered into the agreement with Society in July 1991. The first Borrower's Certificate was submitted in October 1991, and the last in March 1993. The indictment alleged that the scheme to defraud was executed by the submission of four fraudulent Borrower's Certificates on or about the following dates: December 27, 1991; May 8, 1992; February 18, 1993; and March 16, 1993. Each of these certificates falsely reported the gross remaining cash flow for the previous month. After experiencing much financial difficulty, Bison defaulted on the loan. The fraud was discovered by Society in June 1993.

At the close of the prosecution's case, the Defendant moved for judgment of acquittal, which the Court denied. On March 30. 1998, he was convicted by a jury on all four

counts. On April 6, 1998, he renewed his previous motion, and alternatively requested a new trial. On June 2, 1998, the Court denied the motion. (See Memorandum of Opinion and Order dated June 2, 1998.)

B. Sentencing Issues

On June 1, 1998, the probation officer prepared a Presentence Investigation Report. It was revised on July 24, 1998. As explained in detail below, the offense level in this case is highly dependent upon the loss to the bank. The probation officer concluded that the outstanding principal balance on the loan was $1,002,072.83, with accrued interest of $320,276.70. These figures were provided by Scott A. Harbottle, an attorney for Keycorp.

Applying USSG § 2F1.1, the probation officer concluded the base offense level is six (6), and added eleven (11) levels for a loss between $800,000 and $1,500,000. She then added eleven (2) levels for more than minimal planning, and concluded no reduction was warranted for acceptance of responsibility. The result was nineteen (19). She then applied USSG § 2F1.1(b)(6). That provision provides, in part if the offense "affected a financial institution and the defendant derived more than $1,000,000 in gross receipts from the offense, increase by 4 levels. If the resulting offense level is less than level 24,

increase to level 24." Based on this provision, the probation officer concluded the total offense level is 24.

With respect to criminal history, in 1986 the Defendant pled guilty to two misdemeanors for converting funds belonging to the Small Business Administration ("SBA") Special Agent Steven Naum testified at the sentencing hearing with respect to the circumstances of these crimes. The charges were contained in a superseding information. The Defendant originally was charged with felonies. However; without the guidance of prosecutors, the SBA settled a civil lawsuit with the Defendant involving the same conduct. In the settlement, the Defendant did not admit to any wrong-doing, which seriously undercut the Government's case. As a result, the superseding information issued. Because he pled guilty to misdemeanors, the probation officer assigned him a Criminal History Category I.

Based on an offense level 24 and a Criminal History Category I, the probation officer recommended a sentencing range of 51-63 months.

Both parties objected to this calculation and submitted numerous and extensive sentencing memoranda. The primary dispute centers around the calculation of the loss to the bank and the application of section 2F 1.1 (b)(6).

The Government agrees with the probation officer that this provision applies. It argues the loss is no less than the principal amount still owed on the loan, or $1,002,072.83. The Defendant, however, argues this amount is not the "loss" as that term is defined in the sentencing guidelines. He provides alternative calculations (analyzed in more detail below) in which the loss for sentencing purposes is either zero or about $83,000.

The Defendant denies there was more than minimal planning, and seeks a two-level reduction for acceptance of responsibility. The Government takes the opposite position. In addition, the Government objects to the probation officer's conclusion that the Criminal History Category is one. Although the Government concedes only misdemeanors were involved, it seeks an upward departure as more representative of the seriousness of the Defendant's previous conduct.

The Court concludes that neither party correctly calculated the loss. Rather, the loss for sentencing purposes is between $500,000 and $800,000. The Court agrees with the probation officer that an enhancement is warranted for more than minimal planning, no reduction is warranted for acceptance of responsibility, and the Criminal History Category is one. Accordingly, the total offense level is

eighteen (18), and the appropriate sentencing range is 27-33 months.

II. LAW AND ANALYSIS

A. Amount of Loss

1. Applicable Guidelines

The applicable guideline is USSG § 2F 1.1. This provision applies to numerous offenses of fraud or deceit, including bank fraud under 18 U.S.C. § 1344. The guideline sets the base offense level at six (6). USSG § 2F1.1(a).

The provision provides for enhancement if the loss to the victim exceeds $2000. USSG § 2F1.1 (b)(1). The precise enhancement depends upon the amount of loss. For example, if the loss is more than $500,000 and up to $800,000, ten (10) levels are added. If the loss is more than $800,000 and up to $1,500,000. eleven (11) levels are added. USSG § 2F1.l(b)(1)(K) and (L).

An additional provision applies when, as here, the fraud is committed against a financial institution: "If the offense . . . (B) affected a financial institution and the defendant derived more than $1,000,000 in gross receipts from the offense, increase by 4 levels. If the resulting

offense level is less than level 24, increase to level 24." USSG § 2F1.l(b)(6).

Application Note 7 provides instructions for determining the amount of loss. Generally, the note provides: "As in theft cases, loss is the value of the money, property, or services unlawfully taken; it does not, for example, include interest the victim could have earned on such funds had the offense not occurred." Additional instructions are provided for calculating loss due to fraudulent loan applications and contract procurement:

> In fraudulent loan application cases and contract procurement cases, the loss is the actual loss to the victim (or if the loss has not yet come about, the expected loss). For example, if a defendant fraudulently obtains a loan by misrepresenting the value of his assets, the loss is the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lending institution has recovered (or can expect to recover) from any assets pledged to secure the loan. However, where the intended loss is greater than the actual loss, the intended loss is to be used.

USSG §2F 1.1, Application Note 7(b). The provision further recognizes that the loss calculated may not accurately reflect the seriousness of the conduct. In such cases, the Court has discretion to depart upward or downward as appropriate:

> In some cases, the loss determined above may significantly understate or overstate the seriousness of the defendant's conduct.. . . When the loss determined above significantly understates or overstates the seriousness of the defendant's conduct, an upward or downward departure may be warranted.

Id; see also United States v. Moored, 38 F.3d 1419 (6th Cir. 1994).

The Government must prove loss by a preponderance of the evidence. United States v. Feinman, 930 F.2d 495, 500 (6th Cir. 1991). The Court, however, need not determine loss with precision, but need only make a reasonable estimate based on the information available. Moored, 38 F.3d at 1424, citing, USSG § 2F1.1, Application Note 8. In addition, the Court may consider all acts and omissions committed by the Defendant that were part of the same course of conduct as the offenses resulting in conviction. United States v. Bruce, 909 F. Supp. 1034, 1040 (N.D. Ohio 1995). Factors the Court may consider include the nature and duration of the fraud. USSG § 2F1.1, Application Note 8.

At the outset, the Court notes this is not a case involving a fraudulent loan application. The Defendant was not charged with fraudulently procuring the loan. Rather, the fraud occurred afterwards, through the misrepresentation

on the Borrower's Certificates of the gross remaining cash flow. Despite this difference, the Court finds the Application Note for fraudulent loan applications is equally appropriate here.

The Government contends the loss is at least $1,002,072.83, the outstanding principal balance on the loan. The resulting offense level is 24 under the special enhancement provision of 2F1.1(b)(6). The Defendant, however, contends that the outstanding principal balance is not the "loss" under the guidelines. Under the appropriate calculation, the loss is at most $83,673. This results in an enhancement of 6 under 2F1.l(b)(1)(G), and 2F1.l(b)(6) does not apply. In support of this calculation, the Defendant submits an affidavit of David R. Tantlinger, Jr., an accounting expert who testified on the Defendant's behalf at trial. The documents relied upon by Mr. Tantlinger (which include some of the Government's trial exhibits) are attached to the Defendant's initial sentencing memorandum.

2. Amount Not Repaid Less Amount Recovered

Pursuant to Application Note 7(b), the starting point in determining the loss is "the amount of the loan not repaid at the time the offense was discovered". Evidence at trial revealed that the fraud was discovered in June 1993.

According to Mr. Tantlinger, the amount not repaid in June 1993 is about $1,216,000. This figure is consistent with the allegations in the indictment and the evidence at trial. The Government does not dispute this figure. Accordingly, the Court finds the appropriate starting figure is $1,216,000.[2]

The next step in calculating loss is to reduce this amount by the amount recovered from any assets pledged to secure the loan. According to Mr. Tantlinger' s review of the records, the bank recovered a net of $455,480 from the liquidation of Bison's assets. (See Defendant's Supplemental Sentencing Memorandum.) The resultant loss

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[2]The Defendant provides an alternative calculation in which the starting point is the face value of the loan. Under this calculation, the Defendant ultimately concludes the loss is zero. The calculation based on face value, however, is contrary to Application Note 7, which bases loss on the amount not repaid at the time of discovery. The Defendant relies on United States v. Lucas, 99 F.3d 1290 (6th Cir. 1997). Under Lucas, however, strict application of the guideline is the norm. Calculation based on face value is an exception, appropriate only where the loan proceeds go to a third party, not the defendant. Id. at 1295-97, citing. United States v. Chichy, 1 F.3d 1501 (6th Cir.), cert. denied, 510 U.S. 1019 (1993) (where the Defendant fraudulently procured federal housing loans for others). Here, because the loan proceeds went to Mr. Mann's companies, Chichy does not apply, and the calculation based on face value is inappropriate.

is $760,520. This figure is at odds with the Government's position that just over $1 million is the outstanding principal balance on the loan.

3. Exclusion of Interest

According to the Defendant, the source of the discrepancy is that the bank applied proceeds from the liquidation of Bison's assets to post-discovery (June 1993) interest obligations. He argues interest obligations are excluded from the calculation by Application Note 7. Thus, the entire amount recovered must be subtracted from the amount of the loan not repaid. The Government does not dispute the amount the bank purportedly recovered from the liquidation. It also does not dispute that amounts were applied to post-discovery interest obligations. There is support for the Defendant's factual description in the record, and the Government bears the burden of proof. The Court, therefore, accepts the Defendants version of the facts. The Government, however, argues it is appropriate to consider interest obligations in calculating loss under the guidelines.

The Defendant relies on the plain language of Application Note 7, which excludes interest the victim could have earned had the offense not occurred. See also

United States v. Guthrie, 144 F.3d 1006, 101 1 (6th Cir. 1998) (excluding interest in a case not involving a loan).

The Government principally relies on United States v. Jones, 933 F.2d 353 (6th Cir. 1991). There. the Defendant used false names and social security numbers, and lied about her occupation and income to obtain false credit cards. The Court ruled inclusion of interest was appropriate because it was provided for in the credit card agreements. Id. at 354. The Defendant points out this decision was rendered prior to the adoption of the current Application Note excluding interest.

The Government also relies on cases from other circuits in which interest was included. (See Government's Response at 4; Supplemental Response at 2.) Many of these cases involve the fraudulent procurement of bank loans or credit cards (which likewise are subject to an agreed interest rate). These cases distinguish between "opportunity interest" and interest which is expected by virtue of an agreement. The latter was deemed part of the loss.[3]

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[3]United States v. Kunzman, 54 F.3d 1522 (lOth Cir. 1995), cited by the Government, involved securities fraud in which the defendant promised a particular interest rate to the victims. The court actually excluded the promised interest. Id. at 1532. United States v. Lowder, 5 F.3d 467, 471 (10th Cir. 1995) likewise involved investment fraud in

The Court recognizes an apparent contradiction between the plain language of Application Note 7 and the case law relied upon by the Government. The Court, however, need not state a blanket rule with respect to whether expected interest should be included in loss for bank loans. The Court has reviewed all the facts and circumstances, and concludes that the liquidation proceeds should not be applied to interest in this case.

This case is distinguishable from those cited by the Government. Those cases all involve fraudulent procurement, whether of investment funds, credit cards, or loans. The expectation of interest, therefore, as part of the obligation, was created through fraud. Here, fraudulent procurement was not charged. The fraud occurred after the loan was properly obtained. Thus, the expectation of interest was not created through fraud. Because the expectation of interest was not created through fraud, liquidation proceeds should not be applied to interest for sentencing purposes.

The purpose of the Borrower's Certificates supports this conclusion. The Credit Agreement provides:

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which a rate of return was promised to the victims. There, the district court included interest because the promise of interest induced the victims to give money to the Defendant.

> The Companies [Bison] will maintain a combined ratio of the outstanding principal balance due and owing on the Facility 1 Loan to the gross remaining Cash Flow on the Recourse Lease Portfolio at any point in time of not less than [a specified ratio].

(Credit Agreement at ¶ 5.2, emphasis added.) The purpose of the Borrower's Certificate was to verify that the appropriate ratio of outstanding principal balance to cash flow was maintained. If Bison fell out of ratio, it would be in default, and Society could terminate the agreement. Thus, the credit agreement reveals that the Borrower's Certificates were intended to protect the bank from loss of the outstanding principal balance, and not expected interest. The fraudulent Borrower's Certificates placed the principal at risk.

The Court finds the Borrower's Certificates were intended to protect the principal. Fraud in connection with the Borrower's Certificates, therefore, is appropriately linked with the loss of principal, but not expected interest. Accordingly, the liquidation proceeds are applied only to outstanding principal for sentencing purposes. The loss is $760,520.[4]

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[4]This is not to say that the Defendant is entitled to subtract interest payments made during the life of the loan. This is suggested in the Defendant's alternative calculation previously deemed improper by the Court. The fraudulent

3. Predicted Loss Absent Fraud

The Defendant next alleges the Court must deduct the amount the bank would have lost even absent fraud. Mr. Tantlinger concludes this amount is $676,847, making the total loss $83,673.

This step is not specifically provided for in the guidelines. He relies on United States v. Wilson, 980 F.2d 259 (4th Cir. 1992). There, the defendant properly obtained a loan, but was charged with fraud based on the submission of a single false financial statement to the bank. The Court remanded the case for calculation of loss stating:

> Generally, the loss attributable to the false statement is the amount of the outstanding loan less any amounts recouped by the bank from assets pledged against the loan, less the estimated amount the bank would have lost had the statement not been false.

Id. at 262 (emphasis added). Wilson was relied on in United States v. Corpus, 110 F.3d 1529, 1535 (10th Cir. 1997). In Corpus, the Court did not actually disapprove of

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Borrower's Certificates artificially extended the life of the loan. Thus, the bank had an expectation of interest payments under the agreement while it was fraudulently maintained. Such expectation had ceased, however, by the time Bison's assets were liquidated.

the district court's sentence, but merely remanded the case for an explanation of loss. Id. at 1536.

After reviewing these cases in the context of the guidelines, the Court concludes an amount should be deducted based on what the bank would have lost absent fraud. First, Mr. Tantlinger's calculation is arbitrary and speculative. He calculates what the bank would have lost as of March 16, 1993, the date of the last fraudulent Borrower's Certificate. Selection of this date is completely arbitrary. He just as easily could have made the determination based on December 7, 1991, the date of the first fraudulent Borrower's Certificate - or any date in between.

Mr. Tantlinger's calculation also is purely speculative. It fails to recognize that banks can take measures to prevent or reduce losses when borrowers experience financial difficulties. Here, the Defendant's fraud precluded the bank from undertaking countermeasures. Mr. Tantlinger's calculation, therefore, is not sufficiently supported.

The Court also does not believe Wilson can be applied to all cases in which fraud occurs after a loan is properly obtained. To do so would create an immense loophole for anyone who experiences financial difficulties

after obtaining a loan. Such a person could maintain a loan through fraud for any period of time, and then claim the bank would have lost the money anyway. There would never be any danger of an enhanced sentence for the loss. Wilson and Corpus did not involve perpetuation of a loan through fraud for a substantial length of time.

Here, however, the Defendant submitted the first Borrower's Certificate in October 1991. The first fraudulent certificate was submitted in December 1991, only two months later. It was not until June 1993 that the fraud discovered, and by this time the Defendant had submitted four fraudulent certificates. The nature and duration of the fraud may be used as factors in determining loss. USSG § 2F 1.1, Application Note 8. In addition, the Court may consider the entire course of conduct in sentencing. Thus, the Court does not consider each false Borrower's Certificate to constitute a discreet act of fraud. Rather, they evidence a course of fraudulent contact through almost the entire life of the loan, designed to maintain the loan improperly. Indeed, he was charged with a scheme and artifice to defraud. In contrast, in Wilson and Corpus, the defendants were charged with making false statements to a bank (see 18 U.S.C. § 1014), which involves more discreet acts instead of a course of conduct.

The Court finds that Mr. Tantlinger's calculation of what the bank would have lost is speculative and arbitrary. Furthermore, given the nature and extent of the fraud, in this case it is appropriate to attribute the entire loss to the fraud. Accordingly, no additional reduction is warranted, and the loss is $760,520. The Court further finds that this amount is commensurate with the seriousness of the Defendant's conduct. See USSG § 2F1.1, Application Note 7(b) ¶ 2.

B. More Than Minimal Planning

The probation officer recommended a two-level enhancement for more than minimal planning. See USSG § 2F1.l(b)(2). The Government concurs, and the Defendant objects. The Court finds there was more than minimal planning.

"More than minimal planning" means more planning than is typical for commission of the offense in its simple form. It includes repeated acts over a period of time, unless it is clear that each instance was purely opportune. USSG § 1B1.1, Application Note 1(f). The Defendant committed repeated acts. He claims they were simply unrelated acts each constituting.g fraud in its simplest form. The Court disagrees. Instead, they were part of a single course of fraudulent conduct, and were not each purely opportune.

As the Court stated in its opinion denying the Defendant's motion for judgment of acquittal:

> The Defendant reported lease payments as to a Ferrari lease (the "Master Metals Lease") even after the automobile was sold (and thus not a "fixed asset" of Bison). That lease involved a substantial amount of money. He also reported payments on some non-recourse leases, but not on others. He also reported payments on certain non-recourse leases for less than the entire period of the lease. This selective reporting does not comport with Mr. Tantlinger's testimony. The jury reasonably could have concluded that the Defendant selectively reported information regarding the non-recourse leases with the intent to defraud Society.

(Memorandum of Opinion dated 6/2/98, at 7.) This was not fraud in its simple form.

C. Acceptance of Responsibility

The Defendant seeks a two-level reduction for acceptance of responsibility. However, he maintained his innocence through trial. Even during the pre-sentence investigation, as reported by the probation officer, he did not admit he committed the offenses. The sentencing hearing was the first time he apologized to the Court for his conduct.

Conviction at trial does not automatically preclude reduction for acceptance of responsibility. USSG § 3E1.1, Application Note 2; see also United States v. King, 99 F.3d 1361. 1371 (6th Cir. 1996); United States v. Fleener, 900 F.2d 914, 917 (6th Cir. 1990). For a convicted defendant, however, a reduction will be made only in "rare situations". USSG § 3E1.1, Application Note 2. The Court finds this is not a rare situation. Apologies at the time of sentencing certainly are not rare, and the other circumstances of this case do not warrant a reduction.

D. Criminal History Category

The probation officer concluded the Defendant's Criminal History Category is one, considering his previous misdemeanor convictions. The Government seeks an upward departure alleging category one does not adequately reflect the serious of the prior offenses.

The Government does not dispute that the convictions are misdemeanors. Special Agent Naum's testimony was not sufficient to justify a departure. In particular, he admitted there was no evidence that the Defendant personally benefitted from the fraud. The Criminal History Category is one.

III. CONCLUSION

For the foregoing reasons, the term of imprisonment is calculated as follows. The base offense level is six (6). USSG § 2F1.1(a). Ten (10) levels are added because the loss is $760,520 (more than $500,000 and less than $800,000). USSG § 2F1.1(b)(1)(K). Section 2F1.1(b)(6) does not apply because the loss is less than $1,000,000. Two (2) levels are added for more than minimal planning. USSG § 2F1.1(b)(2). No reduction is made for acceptance of responsibility. Therefore, the total offense level is eighteen (18). The Criminal History Category is one, so the sentencing range is 27-33 months.

Accordingly, the actual sentence of 33 months is within the guideline range.

IT IS SO ORDERED.

/s/John M. Manos
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
Northern District of Ohio

UNITED STATES OF AMERICA

Northern Dist.
of Ohio
Filed 9/29/98

v.

Case Number 1:97cr239

BENJAMIN MANN
Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, BENJAMIN MANN, was represented by Robert Rotatori.

The defendant was found guilty on Count(s) 1, 2, 3 and 4 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Number(s)
18 USC 1344	Bank Fraud	03/16/93	1 thru 4

As pronounced on September 23, 1 998, the defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $ 200.00, for count(s) 1, 2, 3 and 4, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 29th day of September, 1998

/s/ John M. Manos
United States District Judge

Defendant's SSAN: 052-42-1640
Defendant's Date of Birth: 07/10/58
Defendant's address: 34208 Aurora Road, Apt. # 300, Solon, Ohio 44139

Defendant: BENJAMIN MANN
Case Number: 1:97cr239

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 33 months. The defendants motion to self-report is granted pending appeal.

The defendant shall surrender to the United States marshal for this district or to the designated bureau of prisons.

RETURN

I have executed this Judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

United States Marshal

Deputy Marshal

SUPERVISED RELEASE

Upon release from Imprisonment, the defendant shall be on supervised release for a term of 5 years.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in which the defendant is released within 72

hours of release from the custody of the Bureau of Prisons.

2. If this judgment imposes a fine, special assessment, Costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, end restitution that remain unpaid at the commencement of the term of supervised release.
3. The defendant shall not own or possess a firearm or destructive device.
4. The defendant shall provide the probation officer with access to any requested financial information.
5. The defendant shall comply with any special conditions as directed by the U.S. Probation Office.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation of officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an Informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

RESTITUTION AND FORFEITURE

RESTITUTION

The defendant shall make restitution to the following persons in the following amounts:

Name of Payee	Amount of Restitution
KeyBank National Association 127 Public Square Cleveland, Ohio 44115 Attention: Loan Administrator Mail Code: OH-01-27-0504	760,520

Payments of restitution are to be made payable to the Clerk, U.S. District Court, 201 Superior Avenue, Cleveland, Ohio 44114.

Restitution shall be paid as directed by the U.S. Probation Office.

If there are multiple payees, any payment not made directly to a payee shall be divided proportionately among the payees named unless otherwise specified here:

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

Guideline Range Determined by the Court:

Total Offense Level:	18
Criminal History Category:	1
Imprisonment Range:	27 months to 33 months
Supervised Release Range:	3 to 5 years
Fine Range:	$6,000 to $60,000
Restitution:	$ 760,520

The fine is waived or is below the guideline range because of the defendant's inability to pay.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Northern Dist.
of Ohio
Filed 6/2/98

UNITED STATES OF AMERICA,		
Plaintiff-Appellee,	)	
	)	
v.	)	**ORDER**
	)	
BENJAMIN H. MANN,	)	
Defendant-Appellant.	)	

Pursuant to the Memorandum of Opinion issued in the above-captioned case this date, Defendant's Motion For Judgment of Acquittal, or For New Trial Pursuant To FRCP#'s 29(a) & 33 is DENIED.

IT IS SO ORDERED.

/s/ John M. Manos
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Northern Dist.
of Ohio
Filed 6/2/98

UNITED STATES OF AMERICA,
Plaintiff,

CASE NO. 1:97CR239
vs. **Judge John M. Manos**

BENJAMIN H. MANN,
Defendant.

MEMORANDUM OF OPINION

On April 6, 1998, Benjamin H. Mann, defendant, filed a Motion For Judgment of Acquittal, or For New Trial Pursuant To FRCP #'s 29(a) & 33. On May 15, 1998, the prosecution responded. For the following reasons, the motion is DENIED.

I. FACTS

On August 26, 1997, the Defendant was indicted on four counts of executing a scheme and artifice to defraud a federally insured financial institution in violation of 18 U.S.C. § 1344. The indictment alleged that the Defendant

was the president and majority shareholder of Bison Leasing Company, Inc. and Bison Equipment Leasing Company, Inc. (collectively "Bison"). Bison had received a loan from Society National Bank (now Keycorp) in the amount of $1,750,000. Defendant allegedly overstated the value of assets of Bison upon which the bank could rely as collateral for the loan. In particular, each count essentially charges him with providing Society a "Borrower's Certificate" falsely stating the amount of gross remaining cash flow due Bison on certain leases, while knowing the amount of gross remaining cash flow was substantially less.

Bison was in the business of leasing various types of equipment, in which field the Defendant had substantial experience. He signed a credit agreement with Society governing the loan. Under the credit agreement, he was to report the "gross remaining Cash Flow on the Recourse Lease Portfolio" to Society. The amount was to be reported on a Borrower's Certificate. (Credit Agreement, ¶ 5.2, Government Exs. 1-12.) He also submitted computer printouts (the "lease reports") containing information as to the various leases. (See Government Exs. 1A-12A.) The agreement defined "Recourse Lease Portfolio" as "those lease obligations maintained on the books and records of the Companies as fixed assets." It also defined "Cash Flow" as "a Person's net income" (less certain amounts not relevant here). (Credit Agreement, ¶ 1.2.) Prosecution witnesses

testified that the gross remaining cash flow was the primary collateral for the loan. After experiencing much financial difficulty, Bison defaulted on the loan.

Bison entered both recourse and non-recourse leases as to its equipment. In a recourse lease, Bison maintained the equipment on its books as a fixed asset. The lessee made periodic rent payments (usually monthly) to Bison. In a non-recourse lease, the stream of future rental payments would be sold off to a finance company for a single, lump-sum discounted payment. Thus, Bison would not receive the monthly payments, which would go to the finance company. The equipment, however, still remained a fixed asset of Bison. The prosecution's position was that the Defendant falsely overstated the amount of gross remaining cash flow on the Borrower's Certificates with an intent to deceive Society as to amount of collateral present for the loan. The Defendant's position was any overstatement was due to his including non-recourse lease payments in the computation of gross remaining cash flow. He alleged this was required under the literal language of the credit agreement, and there was no intent to deceive because he did what he thought was required under the agreement.

At the close of the prosecution's case, the Defendant moved for judgment of acquittal, which the Court denied.

On March 30, 1998, he was convicted by a jury on all four counts of violating 18 U.S.C. §1344. On April 6. 1998, he renewed his previous motion, and alternatively requested a new trial.

II. LAW AND ANALYSIS

18 U.S.C. §1344 states in part: "Whoever knowingly executes, or attempts to execute, a scheme or artifice - (1) to defraud a federally insured financial institution... shall be guilty of an offense against the United States." The Defendant essentially asserts two grounds why he is entitled to a judgment of acquittal, or alternatively a new trial: (1) the Court erred in not giving a "literal meaning" instruction to the jury. and (2) there is insufficient evidence to support the jury's verdict. Neither argument has merit.

A. Jury Instruction

The Defendant alleges that the Court erred in not instructing the jury as to a "literal meaning" defense. He argued he could not be found guilty because he was merely following the literal language of the credit agreement. Although the Court gave a general "good faith" instruction, it did not give a specific instruction that literally complying with the credit agreement is a defense. The Court concludes that there was no error in its instructions.

When criminal fraud is charged, a defendant is entitled to a good faith instruction if requested, and if it is supported by the evidence. Willis v. United States, 87 F.3d 1004, 1008 (8th Cir. 1996). An instruction which conveys the good faith defense and is clear regarding the prosecution's burden of proof as to the elements of the crime is sufficient. United States v. Arcaipane, 41 F.3d 1, 8 (1st Cir. 1994) (further stating defendant "is not entitled to the nuances of phrasing that he finds most soothing.").

Throughout the instructions, the Court made clear the prosecution bore the burden of proof beyond a reasonable doubt that the Defendant had an intent to defraud Society. A separate "specific intent" instruction was given. The Court also gave an extensive "good faith" instruction.[1]

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[1]The "good faith" instruction in part was:

> The good faith of the defendant is a complete defense to the charges of bank fraud contained in counts I through 4 of the indictment because good faith on the part of the defendant is, simply, inconsistent with the intent to defraud alleged in the indictment.
>
> A person who acts, or causes another person to act, on a belief or opinion honestly held is not punishable under this statute merely because the belief or opinion turns out to be inaccurate, incorrect

The Court deemed the good faith instruction (and others) adequate to convey the concept underlying the "literal meaning" instruction proposed by the Defendant. The Court also found the instruction proposed by the Defendant would only have confused the jury. Courts in other cases have ruled instructions beyond general good faith are not required. See United States v. Sasser, 974 F.2d 1544, 1553-54 (10th Cir. 1992), cert. denied, 506 U.S. 1085 (1993) (no instruction required on the issue of whether the defendant's conduct comported with the literal language of a 1-HUD application); United States v. Dale, 991 F.2d 819, 852 (D.C. Cir.), cert. denied, 510 U.S. 1030 (1993) (specific "truth defense" instruction not required).

The Defendant primarily relies on United States v. Gahagan, 881 F.2d 1380 (6th Cir. 1989). and United States v. Hixon, 987 F.2d 1261 (6th Cir. 1992). Neither of these

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> or wrong. An honest mistake in judgment or an error in management does not rise to the level of intent to defraud. . . .
>
> The burden of proving good faith does not rest with the defendant because the defendant does not have any obligation to prove anything in this case. It is the government's burden to prove to you, beyond a reasonable doubt, that the defendant acted with the intent to defraud.

cases addresses the sufficiency of jury instructions. In Gahagan, the issue was whether the defendant falsely represented he did not own a car. The Court ruled he was not the owner because he did not have title. Thus, no false statement was made. 881 F.2d at 1382-83. Gahagan is not analogous to the current case. Hixon cites Gahagan, but bears no similarity to this case. See 987 F.2d at 1267.

Accordingly, the Court concludes its jury instructions were appropriate.

B. Sufficiency of the Evidence

The Defendant alleges he is entitled to a judgment of acquittal because there is insufficient evidence to support the jury's guilty verdict. The standard in deciding a motion for judgment of acquittal is whether the prosecution introduced evidence sufficient for any rational trier of fact to convict, viewing the evidence and all reasonable inferences in the light most favorable to the prosecution. United States v. Pierce, 62 F.3d 818, 826 (6th Cir. 1995), cert. denied, 516 U.S. 1136 (1996); United States v. Knipp, 963 F.2d 839 (6th Cir. 1992). The Court finds there was sufficient evidence to support the jury's verdict of guilty that the Defendant executed or attempted to execute a scheme or artifice to defraud Society in violation of 18 U.S.C. § 1344.

The credit agreement required the Defendant to submit a Borrower's Certificate indicating the total gross remaining cash flow on the "Recourse Lease Portfolio". It is undisputed the Defendant included payments on non-recourse leases in computing gross remaining cash flow, even though such payments were being made to finance companies instead of Bison. He claims the contract required him to include those non-recourse lease payments.

The Defendant relied in part on the testimony of David R. Tantlinger, Jr., an accounting expert. As stated above, the Recourse Lease Portfolio included "those lease obligations maintained on the books and records of the Companies as fixed asserts." Mr. Tantlinger testified that the Recourse Lease Portfolio actually included the non-recourse leases because the underlying equipment remained listed on Bison's books as fixed assets. Indeed, the prosecution witnesses admitted equipment was maintained on the books as fixed assets in the case of non-recourse leases. Mr. Tantlinger further testified that the Defendant should have reported payments on the non-recourse leases even though they were not going to Bison. However, Marvin Kodish, a Society executive involved with this loan, testified the non-recourse leases generated no cash flow (i.e., no income) because the rent payments had been sold off at a discount. Thus, if the lease reports included the non-recourse leases, as to those leases

a should have been entered for their remaining payments and gross remaining cash flow.

It is undisputed that the Defendant reported non-zero payments were due on the non-recourse leases. He also included additional lease information on the lease reports, such as dates for receiving such payments. It was within the province of the jury to believe Mr. Kodish and conclude that the Defendant had reported information regarding the non-recourse leases incorrectly. Coupled with the Defendant's experience in the field, a rational jury could have concluded he did so with the intent to defraud Society.

Even accepting Mr. Tantlinger's version of the reporting requirements, a rational jury still could have convicted the Defendant. The lease reports submitted with the Borrower's Certificates made no distinction between the recourse and non-recourse leases. There was no indication as to which payments were going to Bison and which payments were going to others. The jury reasonably could have concluded the leases were reported in this manner to deceive Society into believing Bison was to receive rental payments for equipment the leases for which had been discounted.

There also was evidence that the Defendant did not report the lease information consistent with Mr. Tantlinger's

testimony. The prosecution summarized such evidence in closing arguments. Defendant reported lease payments as to a Ferrari lease (the "Master Metals Lease") even after the automobile was sold (and thus not a "fixed asset" of Bison). That lease involved a substantial amount of money. He also reported payments on some non-recourse leases, but not on others. He also reported payments on certain non-recourse leases for less than the entire period of the lease. This selective reporting does not comport with Mr. Tantlinger's testimony. The jury reasonably could have concluded that the Defendant selectively reported information regarding the non-recourse leases with the intent to defraud Society. This is particularly true when the Defendant's reporting is viewed in conjunction with his experience in the field, and his financial troubles at the time.

Accordingly, the Court concludes that there was sufficient evidence to support the jury's verdict of guilty on all counts.

III. CONCLUSION

For the foregoing reasons, Defendant's motion for judgment of acquittal, or alternatively a new trial, is DENIED.

IT IS SO ORDERED.

/s/ John M. Manos
UNITED STATES DISTRICT JUDGE

18 USCA § 1344

Whoever knowingly executes, or attempts to execute, a scheme or artifice—

(1) to defraud a financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;

shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

USSG, § 2F1.1. Fraud and Deceit; Forgery, Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States.

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(1) If the loss exceeded $2,000, increase the offense level as follows:

Loss (Apply the Greatest)	Increase in Level
(A) $2,000 or less	no increase
(B) More than $2,000	add 1
(C) More than $5,000	add 2
(D) More than $10,000	add 3
(E) More than $20,000	add 4
(F) More than $40,000	add 5
(G) More than $70,000	add 6
(H) More than $120,000	add 7
(I) More than $200,000	add 8
(J) More than $350,000	add 9
(K) More than $500,000	add 10
(L) More than $800,000	add 11
(M) More than $1,500,000	add 12
(N) More than $2,500,000	add 13
(O) More than $5,000,000	add 14
(P) More than $10,000,000	add 15
(Q) More than $20,000,000	add 16
(R) More than $40,000,000	add 17
(S) More than $80,000,000	add 18

(2) If the offense involved (A) more than minimal planning, or (B) a scheme to defraud more than one victim, increase by 2 levels.

(3) If the offense was committed through mass-marketing, increase by 2 levels.

(4) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency; (B) a misrepresentation or other fraudulent action during the course of a bankruptcy proceeding; or (C) a violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines, increase by 2 levels. If the resulting offense level is less than level 10, increase to level 10.

(5) If the offense involved--

(A) the possession or use of any device-making equipment;

(B) the production or trafficking of any unauthorized access device or counterfeit access device; or

(C)(i) the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification; or (ii) the possession of 5 or more means of identification that unlawfully were produced from another means of identification or obtained by the use of another means of identification,increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(6) If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means, increase by 2 levels. If the resulting offense level is less than level 12, increase to level

12.

(7) If the offense involved (A) the conscious or reckless risk of serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by 2 levels. If the resulting offense level is less than level 13, increase to level 13.

(8) If the offense--

(A) Substantially jeopardized the safety and soundness of a financial institution; or

(B) Affected a financial institution and the defendant derived more than $1,000,000 in gross receipts from the offense, increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24.

(c) Special Instruction

(1) If the defendant is convicted under 18 U.S.C. §1030(a)(4), the minimum guideline sentence, notwithstanding any other adjustment, shall be six months' imprisonment.